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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ALAN L. LEVIN,

Petitioner,

v.

MAYA CONSTRUCTION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE PETITIONER ALAN L. LEVIN CAN BE BOUND OR RESTRICTED BY THE BANKRUPTCY PROCEEDING OF MAYA CONSTRUCTION FILED PURSUANT TO CHAPTER 11 OF THE *UNITED STATES BANKRUPTCY CODE, 11 U.S.C. § 1101 ET SEQ.* OR HAD ANY DUTY TO PARTICIPATE IN THAT BANKRUPTCY WHEN HE DID NOT RECEIVE NOTICE OF THE ISSUANCE OF THE DISCLOSURE STATEMENT, PROPOSED PLANS OF REORGANIZATION AND NOTICE OF THE HEARING ON CONFIRMATION OF THE PLAN OF REORGANIZATION OF MAYA CONSTRUCTION IN LIGHT OF THE UNITED STATES CONSTITUTION, THE BANKRUPTCY CODE AND THE PREVIOUS OPINIONS OF THIS COURT.

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PETITION FOR WRIT OF CERTIORARI

Alan L. Levin respectfully petitions for Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* 1a-13a) is reported at 78 F.3d 1395 (1996). The opinion of the district court (App., *infra* 15a-20a) is unreported. The opinion of the bankruptcy court (App., *infra*, 21a-26a) is unreported.

JURISDICTION

The Court of Appeals filed its opinion March 5, 1996. Motion for Rehearing filed March 19, 1996, was denied via order entered April 4, 1996, with the jurisdiction of this Court invoked pursuant to *28 U.S.C. § 1254(1)*. (App., *infra*, 14a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution in relevant part states " * * * nor shall any person * * * be deprived of life, liberty or property without due process of law * * * ".

STATEMENT

1. Respondent prior to filing of Bankruptcy investigated a potential claim held by Alan Levin, Petitioner herein. Respondent filed bankruptcy and after hearing on confirmation of the Respondent's Plan, but before the confirmation order was signed gave Alan Levin his first formal notice of the Bankruptcy.

2. Levin responded to notice of his contingent claim valued at $1.00, filed by Maya, alleging a $4 million contamination claim which Maya had revealed throughout the bankruptcy. The bankruptcy court ruled Levin bound to the plan of Respondent, Maya Construction based on knowledge.

3. The bankruptcy court judgment was overruled by both the district court and the ninth circuit court of appeals. Petitioner contents that he is not bound by the plan of Maya Construction under the case law of the various circuits and this Court. Remand has been ordered by the ninth circuit court of appeals to determine whether the Levin acted appropriately after reviewing formal notice with it to be determined whether Levin is to be bound by the plan of reorganization of Respondent, Maya Construction. (App., *infra* 13(a)).

4. A voluntary petition under Chapter 11 of the United States Bankruptcy Code, was filed by Maya Construction/Respondent on or about February 22, 1991. (Bk. Dkt. 1, 2/22/91).[1]

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[1] Citations to the record are divided into documents filed within the bankruptcy and bankruptcy adversary dockets, and

5. On or about March 4, 1991, the first master mailing list was lodged with the bankruptcy court. (Bk. Dkt. 1, 3/4/91) Then on March 11, 1991, the Respondent Debtor listed its statement of financial affairs and schedule of assets and liabilities and did not list any contingent or other liability owed to the Petitioner, Levin. (Bk. Dkt. 10, 3/11/91).

6. March 11, 1991, the Debtor amended its mailing list, no amendment to add Levin as a creditor was made. (Bk. Dkt. 11, 3/11/91).

7. March 29, 1991, a certificate of mailing was filed, indicating a response required by creditors, Levin does not appear on the mailing list attached thereto. (Bk. Dkt. 28, 3/29/91) 6. The master mailing list was amended by the Respondent on April 12, 1991, failing to list Levin as a creditor or as an interested party. (Bk. Dkt. 39, 4/12/91).

8. As shown through page 3 of Bk. Dkt. 73, dated 6/6/91, the bankruptcy attorney for the Debtor was discussing strategy with Attorney R. Rollman on February 11, 1991, prior to the filing of bankruptcy. (Bk. Dkt. 73, 6/6/91).

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those designated as items to be included in the record on appeal to the district court. Items 1-309 in Bankruptcy Cause No. 91-00611-TUC-LO and Items 1-27 in Bankruptcy Adversary Docket 92-0032-A. These citations are be referred to as Bk. Dkt., with Item number and date following and Adv. Dkt., Item number and date following, respectively. Items from the record of the District Court are referred to as DC Dkt., Item and date following.

9. Respondent, Maya Construction through their attorneys, Gabroy, Rollman & Bosse had a research memorandum done concerning what they believed to be potential liability concerning contaminated soil placed on the Levin property. This research memorandum was dated January 14, 1991, and was done by Ronna L. Fickbohm for Richard N. Rollman. (See Bk. Dkt. 297, Pages 3 through 21, 3/3/93).

10. Through a series of letters dated February 22, 1989, January 30, 1991 and January 18, 1991, (attached as exhibits A-C to Bk. Dkt. 300) Maya Construction was aware of the claim of Alan L. Levin and failed to include Levin as a creditor when it filed its petition and disclosure statements. (Bk. Dkt. 300, 3/11/93).

11. On June 7, 1991, affidavits of mailing concerning five different items, were filed, again Levin did not appear on the mailing list. (Bk. Dkt. 76, 6/7/91).

12. Through a disclosure statement filed by Respondent, on June 24, 1992, Maya Construction revealed that it had been working on a project known as the Arizona Department of Transportation Bridge which was beset with defective design and "soil contamination" issues which were beyond the control of the firm. (Bk. Dkt. 84, 6/24/91).

13. An additional amendment to the master mailing list occurred on 7/16/91. Levin was not added as a creditor though the disclosure statement discussed the contamination issue. (Bk. Dkt. 95, 7/16/91) Also filed on July 16, 1991, was the order and notice of hearing on the disclosure statement, setting the hearing for August 23, 1991, this was not sent to Levin. (Bk. Dkt. 96, 7/16/91).

14. July 24, 1991, an affidavit of mailing by attorney for Debtor regarding order approving disclosure statement was filed, Levin's name does not appear on the attached mailing list. (Bk. Dkt. 98, 7/14/91).

15. July 31, 1991, an amended Affidavit of Mailing was filed with an amendment to the Master Mailing List being made on August 7, 1991. Levin's name does not appear in either document. (Bk. Dkts. 101 & 102 (7/31/91 & 8/7/91).

16. On August 15, 1991, Respondent gave notice of the Debtor's motion to limit further notice and filed a motion to limit further notice which allowed the Debtor to proceed giving notice only to creditors on the master mailing list who applied, within an appropriate time to receive notice. Levin received neither of these documents. (See Bk. Dkts. 109 & 110, 8/15/91).

17. The motion and notice above were mailed out under an affidavit of mailing signed by the Debtor's counsel without that affidavit and/or the attached master mailing list including the name of Levin. (Bk. Dkt. 113, 8/19/91).

18. August 23, 1991, the disclosure statement of the Debtor mentioning of Levin's contaminated soil/land, without giving him notice as a creditor, was approved tentatively with a new hearing date of October 17, 1991. (Bk. Dkt. 114, 8/23/91).

19. September 6, 1991, the Master Mailing List was again amended, Levin was not added. (Bk. Dkt. 117, 9/6/91).

20. September 12, 1991, notice to all creditors was limited through prior order, to those creditors who requested continued notice. (Bk. Dkt. 121, 9/12/91).

21. An affidavit of mailing was filed concerning the order for limitation of notice on September 20, 1991, Levin is not on the mailing list. (Bk. Dkt. 125, 9/20/91).

22. October of 1991, further amendment to the mailing list occurred pursuant to court order, on that same date an affidavit of Debtor's counsel was filed stating that the amended master mailing list included all names and address of persons who made a request to stay on the master mailing list, this list does not include Levin. (Bk. Dkts. 130 & 131, 10/9/91).

23. On October 22, 1991 an affidavit of mailing was filed by the Debtor which did not include Levin's name. (Bk. Dkt. 141, 10/22/91).

24. October 17, 1991, the confirmation hearing of Maya Construction was continued as was the approval of disclosure statement filed by the Debtor that hearing was set for December 3, 1991, Levin was not given notice. (Bk. Dkt. 143, 10/17/91).

25. November 1, 1991, an amended plan of reorganization and disclosure statement, again mentioning Levin's contaminated land, were filed with the bankruptcy court and through affidavit of mailing, dated November 4, 1991, were mailed to all parties on the master mailing list, as restricted, through motion for limitation. (Bk. Dkts. 144, 155 & 151, 11/1/91 & 11/4/91).

26. The master mailing list was again amended through an entry on the docket of November 7, 1991,

request for addition made by the Debtor was entered November 8, 1991, the amendment does not include the name of Levin. (Bk. Dkts. 158 & 159, 10/21/91).

27. Entered into the record on November 15, 1991, is an affidavit of mailing by attorney for Debtor, regarding supplemental notice, with a copy of the master mailing list attached, Levin's name does not appear on this list. (Bk. Dkt. 183, 11/1/91).

28. December 3, 1992, a hearing on confirmation of the Plan filed by the Debtor occurred. The Court stated in its minutes:

> "MR. SEEFELDT ADVISES THE COURT THIS PLAN CAN NOW BE CONFIRMED. THREE OBJECTIONS WERE FILED BUT HAVE NOW BEEN RESOLVED. HE RECITES THE OBJECTIONS AND RESOLUTION INTO THE RECORD.
>
> * * *
>
> THE COURT: PLAN WILL BE CONFIRMED SUBJECT TO EVERYONE SIGNING OFF ON FORM OF ORDER".(Bk. Dkt. 200, 12/3/91).

29. On December 20, 1991, an amendment to the Debtor's master mailing list matrix was filed including the name and address of Alan Levin, on that same date an amendment of schedules was filed including the claim of Alan Levin as a contingent liability regarding contamination of soils with the claim being set at $1.00 or more. Neither the request for addition to Debtor's master mailing list nor the amended schedules were sent to Levin. (Bk. Dkt. 205, 206 & 207, 12/20/91).

30. December 26, 1991, an objection to the contingent claim of Alan L. Levin was filed by Maya Construction. A copy of this document was mailed to Alan Levin and acknowledged received by Alan Levin, with a response thereto being filed in January, 1991. (Bk. Dkts. 208 & 226, 12/26/91 & 1/23/92).

31. Though having been added to the master mailing list, Levin failed to receive notice of other action taking place in Debtor's case, as Levin did not know of the order, limiting notice to only those having made a request to remain on the Master mailing list. (Bk. Dkt. 283, 1/12/93, Bk. Adv. Dkt. 11, 12/31/92, Bk. Adv. Dkt. 24, 2/8/93).

32. Petitioner, Levin filed a motion for relief from automatic stay requesting the ability to file a Complaint to preserve the Arizona statute of limitations running as to Maya Construction and further filed a motion requesting the court to determine the status of Levin as being bound under the plan of reorganization as modified and confirmed by the bankruptcy court. (Bk. Dkts. 281 & 283, 1/11/93 & 1/22/93).

33. On March 21, 1993, the bankruptcy court entered findings of fact and conclusions of law and a minute entry order denying rehearing and binding the creditor, Levin, without legal notice, to the plan of reorganization, finding that the Debtor had knowledge that Levin would not file a claim and further stating that Levin who did not know of his claim against the Debtor, until after Debtor's Plan was confirmed, indicates that Maya Construction would not know that Levin would file

a claim in this matter. (Bk. Dkts. 302 & 303, 3/21/93). (App., *infra*, 21a-26a)

34. On Appeal, the Arizona district court found the findings of fact made by the bankruptcy judge clearly erroneous further finding Levin to have chosen poorly in failing to appeal his inclusion within the plan of reorganization and discharge of his claim, though finding Levin did not receive legal notice of the plan of reorganization, disclosure statement filings or of the hearings regarding confirmation of the plan of reorganization and or approval of the disclosure statement filed by Respondent. (DC Dkt. 14, 10/26/93). (App., *infra*, 15a-20a)

35. The ninth circuit court of appeals opinion remands to the bankruptcy court for determination of whether Alan Levin acted appropriately having received notice of the Maya Bankruptcy through Maya's filing of the contingent claim for Alan Levin between the confirmation hearing and the time of the confirmation order being signed:

> "The District Court concluded that Mr. Levin forfeited his claim by not acting more rapidly and aggressively to derail confirmation of the plan. The bankruptcy court ruled against Levin on different grounds, which we and the district court have rejected, that Mr. Levin's claim was not known. Accordingly, we vacate the judgment, and remand to the bankruptcy court so that it can determine whether, despite Maya's failure to list Mr. Levin as a creditor when it should have, the subsequent notice to Mr. Levin would cause his claim to be discharged by the order confirming the plan. (See *In Re Remington Rand Corp.*, 836 F.2d 825, 833 (3d. Cir. 1988).

(Remand to determine whether four year delay between creditor's knowledge and action was too long). The Bankruptcy Court should decide in the first instance whether, when Mr. Levin eventually was served, he had notice that the proceedings were far advanced, and, by waiting too long to take action, 'ignore[d] the proceeding to which the notice refers at [his] peril'. *Gregory*, 705 F.2d at 1123. See *In re Hunt*, 146 B.R.178 (Bankr. N.D. Tex. 1992) (Two and one-half year delay too long; *In re Pagan*, 59 B.R. 394 (Bankr. D.P.R. 1986) (Four year delay too long).

REASONS FOR GRANTING THE PETITION

PETITIONER, LEVIN, APPEALS FROM THE ORDER OF THE NINTH CIRCUIT COURT OF APPEALS CALLING FOR A REMAND TO THE BANKRUPTCY COURT TO ASCERTAIN WHETHER LEVIN ACTED IN ADEQUATE FASHION TO PROTECT HIMSELF FROM BEING BOUND BY THE PLAN OF REORGANIZATION OF MAYA CONSTRUCTION. UNDER *NEW YORK V. NEW YORK, NEW HAVEN & HARTFORD RAILROAD, CO.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953), ___, THE U.S. CONSTITUTION AND THE UNITED STATES BANKRUPTCY CODE 11 *U.S.C. § 1101 ET SEQ.*, LEVIN CANNOT BE BOUND BY THE BANKRUPTCY OF RESPONDENT, MAYA CONSTRUCTION.

Levin received **Maya's** filing of a notice of Levin's contingent claim on the 26th of December 1991. The ninth circuit court of appeals has set this case to be remanded to the bankruptcy court to determine whether Levin acted in an appropriate fashion subsequent to Mr. Levin

receiving the contingent claim, filed for him by the Respondent, Maya, and subsequent to the hearing confirming Maya's plan of reorganization.

Pursuant to Rule 2002(b), Maya Construction was required to give Alan L. Levin not less than twenty-five (25) days notice by mail, including but not limited to notice of the time fixed for filing objections and notice of the hearing for considering approval of the disclosure statement and hearing to consider the confirmation of Maya's chapter 11 plan.

Bankruptcy Rule 3017(D) provides that upon approval of the disclosure statement the debtor in possession shall transmit the plan and the disclosure statement and a notice of time within which acceptance and/or rejections may be filed, to all creditors. Under Rule 3020(B)(2), the court shall rule on requested confirmation after notice and hearing as provided in Rule 2002.

Pursuant to the Fifth Amendment of the U.S. Constitution:

> "[nor shall any person] be deprived of life, liberty or property, without due process of law. . . . . "

Creditor, Levin, with a substantial claim in excess of $4 million dollars, available against Maya Construction was not given notice of the bankruptcy proceedings with regard to the disclosure statement, confirmation of plan, time for filing of objections and/or the date of the hearing for the confirmation of the chapter 11 plan.

> "Actual knowledge of the filing of a bankruptcy petition does not negate the statutory notice

> requirements nor does it place a duty on creditors to inquire regarding time limitations for filing claims". *New York v. New York, New Haven & Hartford Railroad, Co.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953), *cited in, In re: Spring Valley Farms, Inc.*, 85 B.R. 593, 595 N.D. Ala. (1988), aff. 863 F.2d 832 (11th Cir. 1989).
>
> The creditor has a 'right to assume' that he will receive all of the notices required by statute before his claim is forever barred". *New York v. New York, New Haven & Hartford, R.R. Co.*, 344 U.S. 293, 297 (1953). (See also *In re: Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir. 1974); *In re: Harbor Tank Storage Co., Inc.*, 385 F.2d 111, 115 (3rd Cir. 1967).

As demonstrated by the Tenth Circuit, citing this Court, as well as the U.S. Constitution, Maya Construction without giving notice as required, cannot rely on the confirmation of it's plan. Levin is not bound by the plan of reorganization, with no stay in place, Levin should have been allowed to press his claim without limitation.

> "However, we hold that not withstanding the language of Section 1141, the discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment to the United States Constitution. See 5 Collier on Bankruptcy Para. 1141.01[b], at 1141-12. In our view, this holding is supported by the Supreme Court's decisions in *Mullane, supra,* and *New York, supra,* and by two other circuit court opinions which applied this reasoning specifically to bankruptcy reorganization proceedings. See *In re: Intaco, supra, In re: Harbor Tank, supra.* Inasmuch as we have held the notice by Reliable to Olson was deficient, the district

court's decision was not contrary to law; Olson's claim cannot be bound to the plan and, thus, it is not dischargeable.

A fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake. Specifically, the reorganization process depends on all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests. See, *In re: Harbor Tank, supra.* We will not require Olson to subject its claim to a confirmed reorganization plan that it had no opportunity to dispute. *Reliable v. Olson*, 726 F.2d 620, 623 (10th Cir. 1984).

As the Tenth Circuit Court of Appeals also said in *Reliable Electric v. Olson*, 726 F.2d 620, 622 stated:

"As specifically applied to Bankruptcy Reorganization proceedings, the Court has held that a creditor, who has general knowledge of a debtor's reorganization proceeding has no duty to inquire about further Court action. The creditor has a 'right to assume' that he will receive all the notices required by statute before his claim is forever barred." *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953), See also *In Re Intaco Puerto Rico, Inc.*, 494 F.2d. 94, 99 1st Cir. (1974); *In Re Harbor Tank Storage Co., Inc.*, 385 F.2d 111, 115 (3d Cir. 1967). Thus, Olson acted reasonably when it expected the same formal notice of the confirmation hearing which was sent to other identifiably creditors. Inasmuch as

> *Olson* was deprived of the opportunity to comment on Reliable's Third Amended Plan of Reorganization, it was denied due process of law. *Reliable Electric*, at 622.

Levin cannot be bound to the reorganization plan of Maya Construction, Levin should have been allowed to proceed to state court. The ninth circuit now indicates that Levin must go before the bankruptcy judge who determined that Levin was bound to the plan because of notice, to learn whether or not the bankruptcy court believes Levin took sufficient steps subsequent to receiving notice of Maya's bankruptcy to protect his rights.

Levin cannot be bound by the plan as he received none of the notices required by statute and did not have adequate notice of the proceeding under *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953).

If Levin is not to be bound by the plan of reorganization how can it later be determined that Levin can be bound if Levin did not take adequate steps subsequent to confirmation of the plan to protect his rights.

The ninth circuit court of appeals has ruled directly contrary to mandatory precedent which would indicate that Levin is not bound by the plan of reorganization with the record indicating that Levin took adequate steps in an attempt to protect himself and was simply the victim of a bad ruling and should not be further exposed to further query.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 3rd day of July, 1996.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MAYA CONSTRUCTION COMPANY, ID# 86-0352941, *Debtor.*	No. 93-17195
ALAN L. LEVIN, *Appellant,* v. MAYA CONSTRUCTION, *Appellee.*	D.C. No. CV-93-00233-JMR OPINION

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
May 12, 1995 – San Francisco, California

Filed March 5, 1996

Before: Alfred T. Goodwin, Cecil F. Poole
and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

SUMMARY

Bankruptcy/Corporate Reorganization (Chapter 11)/ Litigation and Procedure (Civil)

The court of appeals reversed a district court judgment, vacated a bankruptcy court judgment, and remanded. The court held that a creditor's actual knowledge that a debtor's Chapter 11 bankruptcy proceeding is going forward does not obviate the need for notice, but remand was warranted for a determination as to whether subsequent notice to a creditor would cause his claim to be discharged by an order confirming the plan.

Appellant Alan Levin and appellee Maya Construction agreed that Maya would place fill dirt on Levin's land. The soil turned out to be contaminated. Levin and Mr. Ruiz, Maya's president, had conversations concerning the possibility of Levin suing Maya. Although at some point Levin stated orally that he did not intend to pursue a claim against Maya, Levin's lawyer wrote to Maya demanding that Maya defend, indemnify, and hold harmless Levin from consequences of the contaminated soil. At some point, the possibility that Levin might sue Maya concerned Ruiz enough that he hired an attorney to prepare an evaluation of the potential claim.

Maya filed for reorganization under Chapter 11 of the Bankruptcy Code. Maya did not list Levin as a creditor, and Levin was not on Maya's "Master Mailing List." Maya also left Levin off of the statement of financial affairs and schedule of liabilities. The bankruptcy case proceeded without Levin. Maya filed a plan of reorganization and disclosure statement. Maya did not send Levin a notice of the hearing on its reorganization plan and bar date for filing claims. The bankruptcy court approved a

final reorganization plan, subject to "everyone" signing off.

Maya filed a "Request for Addition to Debtor's Master Mailing Matrix," and filed an amended schedule of creditors listing Levin as having a contingent claim for contaminated soil. Maya filed an "Objection To Contingent Claim of Alan L. Levin" and notice of hearing and served the objection and notice on Levin. Levin filed a response giving notice of his claim for damage to his property on account of the contaminated soil. The court directed that the claim be designated an adversary proceeding and set it for trial.

Meanwhile, the bankruptcy court entered an order confirming the reorganization plan. Levin filed a motion to obtain a judicial determination of whether he was bound by the confirmation of the reorganization plan. The bankruptcy court decided that Levin was bound by the plan, despite his lack of proper notice. The district court affirmed. Levin appealed, contending that he should not have been held bound by the confirmation of the plan because Maya knew of his claim but did not give him relevant notice.

[1] The bankruptcy court erred in treating Levin's claim as one not known to Maya. Levin was entitled to formal notice of the proceedings. Although Levin told Ruiz he was not going to sue Maya. Levin's lawyer sent Maya a formal written demand which gave Maya reason to think the contrary. [2] It is the debtor's knowledge of a creditor which controls whether the debtor has a duty to list the creditor. [3] The fact that a creditor has actual knowledge that a Chapter 11 proceeding is going forward

involving a debtor does not obviate the need for notice. [4] A debtor must list a creditor whose identity and claim he knows. The creditor who is not given notice, even if he has actual knowledge of reorganization proceedings, does not have a duty to investigate and inject himself into the proceedings.

[5] Ninth Circuit cases involving Chapter 7 and 13 were distinguishable.

[6] The case was remanded to the bankruptcy court for a determination as to whether subsequent notice to Levin would cause his claim to be discharged by the order confirming the plan.

COUNSEL

Joseph H. Watson, Law Office of Joseph H. Watson, Tucson, Arizona, for the appellant.

Ralph E. Seefeldt, Seefeldt, Sparks & Neal, Tucson, Arizona, for the appellee.

OPINION

KLEINFELD, Circuit Judge:

This is a chapter 11 bankruptcy case. The debtor did not timely list a creditor known to him, and the reorganization plan was confirmed before the creditor attacked it. The question is whether the creditor is bound by the confirmation of the plan.

FACTS

Mr. Levin and Maya Construction agreed that Maya would place fill dirt excavated elsewhere on Levin's land. The soil, excavated at a local bridge project Maya was working on, turned out to be contaminated with diesel fuel. Mr. Levin's lawyer wrote to Maya in November of 1990 demanding that, pursuant to its contract, Maya defend, indemnify and hold harmless Mr. Levin from all consequences of the contaminated soil, and proceed with an environmental assessment by a qualified person on Mr. Levin's behalf.

Subsequent to the contamination, there were conversations between Mr. Levin and Mr. Ruiz, the president of Maya. There is some ambiguity about exactly what they said to each other concerning the possibility of Mr. Levin suing Maya. Mr. Ruiz said in his affidavit that Mr. Levin told him either that Mr. Levin recognized that he had no claim, or that he preferred to sue a third party and have Maya as an ally instead of an adversary:

> In the discussions between [Ruiz] and Levin, Levin indicated to [Ruiz] he had no claim, or was proposing to file no claim against Maya Construction Company but that he did want to obtain from the undersigned its cooperation and assistance in pursuing his claim against the Arizona Department of Transportation.

In Mr. Levin's recollection, he intended not to sue Maya when he thought Maya had been ignorant of the diesel fuel contamination, but changed his mind when he discovered that Maya had known about the contamination:

> [Alan Levin says] [t]hat Roberto Ruiz and/or Maya Construction at no time were informed

> that a claim would not be made, as I discussed the contamination with Roberto Ruiz but at that time had no facts which indicated that Maya Construction Company knew that the soil being placed on my property was contaminated.
>
> . . .
>
> That I, Alan Levin, was not aware of any potential liability of Maya Construction with regard to the contaminated soil on my property until after the hearing on confirmation of the Maya Construction Plan of Organization.

Affidavit of Alan Levin, February 8, 1993, at 1, 5.

Although Mr. Levin's and Mr. Ruiz's recollections differ, they agree on what is material to this bankruptcy case: Mr. Ruiz knew that (1) Mr. Levin believed that Mr. Ruiz had put contaminated soil on Mr. Levin's land; (2) Mr. Levin had sent a formal written notice that he had a claim against Maya; (3) Mr. Levin stated orally that he did not intend to pursue the claim against Maya. The possibility that Mr. Levin might sue Maya concerned Mr. Ruiz enough that he hired an attorney to prepare an evaluation of the potential claim. The record does not establish whether Mr. Ruiz retained counsel regarding Mr. Levin's potential claim before or after the conversations in which Mr. Levin, as Mr. Ruiz recollected them, said that Mr. Levin had no claim or was not proposing to file a claim against Maya.

On February 22, 1991, Maya Construction filed for reorganization under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 101, *et seq.* This filing date was about three and one half months after Maya had received Mr. Levin's lawyer's written demand. It was after Maya asked its

own attorneys to evaluate Mr. Levin's possible claim against Maya. Mr. Ruiz's declaration does not claim that Mr. Levin had made his statements about not filing a claim prior to the bankruptcy filing. All Mr. Ruiz says is that these conversations were "prior to *August 23, 1991,* the claim bar date." (emphasis in original).

Maya did not list Mr. Levin as a creditor. In March 1991, Maya filed the "Master Mailing List" required by the bankruptcy court of all creditors. Mr. Levin was not on the list. Maya also left Mr. Levin off the statement of financial affairs and schedule of liabilities it filed in March. The bankruptcy case proceeded without Mr. Levin. In June, Maya filed a plan of reorganization and disclosure statement. In July, Maya sent all creditors, but not Mr. Levin, notice of the hearing on its reorganization plan and bar date for filing claims. The only evidence on the record that Mr. Levin knew Maya was engaged in a bankruptcy proceeding before December is Mr. Ruiz's statement in his affidavit that "prior to *August 23, 1991,* the claim bar date in the above captioned matter, the undersigned had discussions with Alan L. Levin ("Levin") in which discussions it was evident that Maya Construction Company was a Debtor in a Chapter 11 proceeding." (emphasis in original).

On December 3, 1991, the bankruptcy court approved a final reorganization plan, "subject to everyone signing off on form of order." Mr. Levin still was not in the case, never having been served with any notice.

Mr. Levin's name first appears in the bankruptcy court file December 20, 1991. Maya filed a "Request for Addition to Debtor's Master Mailing Matrix," attaching

70 names in mailing label form. Maya filed an amended schedule of creditors the same day, listing Mr. Levin as having a contingent claim for contaminated soil. On December 26, Maya filed an "Objection To Contingent Claim of Alan L. Levin" and notice of hearing in January, and served the objection and notice on Mr. Levin. Mr. Levin filed a response on January 23, 1992, giving notice of his claim estimated at $500,000 for damage to his property on account of the contaminated soil. At the hearing, the court directed that the claim be designated an adversary proceeding and set it for trial in October. Subsequently it was rescheduled for January of 1993.

Meanwhile, on February 24, 1992, the bankruptcy court entered an order confirming the reorganization plan as anticipated at the December 3 hearing. Mr. Levin's name and address are in the matrix of mailing labels attached to an affidavit signed by Maya's attorney, in which he swears that he sent a notice of the February 24 order to all persons on that list. Mr. Levin and his wife submitted affidavits that they had not received this notice, but the bankruptcy court found that the notice had been mailed to them. Mr. Levin had not, during the approximately two months between his first notice and the court's confirmation of the plan, filed any paper to prevent the confirmation.

A little less than a year later, on January 12, 1993, Mr. Levin filed a motion to obtain a judicial determination of whether he was bound by the confirmation of the reorganization plan. He argued that he had been entitled to notice of the plan and an opportunity to object, and had been denied those rights. The bankruptcy court made

findings of fact, evidently based on the written submissions described above:

> The court finds that the debtor was hired by Levin to place soil on [Levin's] property; that such soil was contaminated; that Levin discovered the contamination pre-petition; that the debtor filed its petition under Chapter 11 on February 2, 1991; that Levin had actual notice of the debtor's bankruptcy; that Levin did not file a claim in this matter prior to the bar date; that Levin did not ask the court to extend the bar date; and that the debtor did not file a claim in Levin's behalf.
>
> The court also finds that Levin was not placed on the master mailing list by debtor, nor did Levin request to be added; that the debtor's disclosure statement was approved on October 24, 1991; that the debtor's plan was initially confirmed on February 24, 1992; that Levin did not receive notice of the hearings concerning the debtor's disclosure statement and plan; that Levin was added to the master mailing list and that his claim was added to the debtor's schedules on December 20, 1991; that the notice of the order of confirmation was mailed to Levin and that Levin did not file an objection to or appeal the confirmation order.
>
> The court further finds that Levin did not know of its claim against the debtor until after the debtor's plan was confirmed; and that during the pendency of the case, Levin indicated that he would not file a claim in this bankruptcy.

The bankruptcy court decided that Levin was bound by the plan, despite his lack of proper notice, on two grounds: first, since Levin had indicated that he would

not file a claim, Maya "had knowledge that a claim would *not* be filed," and Levin could not be a known creditor; second, based on Levin's statement that he did not learn of the existence of his claim until after the plan was confirmed, Maya should not be held responsible for not acknowledging a claim Levin himself did not know of. As the court saw it, Mr. Levin knew of the contamination and, because of the financial significance of such an event, had good reason to investigate his possible claim fully between 1989, when Maya put the contaminated soil on his land, and 1992, when the plan was confirmed, yet told Maya he did not intend to make a claim against Maya. The court also noted that Levin did not object to discharge of his claim until ten months after the plan was confirmed.

Mr. Levin appealed to the district court, which affirmed. The district court concluded that the bankruptcy court had erred in treating Mr. Levin as an unknown creditor, because Maya had retained counsel to evaluate his potential claim and knew that he had the potential to make a claim. Nevertheless, the district court determined that Mr. Levin was barred because he did not seek to file an untimely claim despite the numerous procedural mechanisms open to him.

ANALYSIS

Mr. Levin's argument is that he should not have been held bound by the confirmation of the plan because Maya knew of his claim, yet did not give him notice of the time

fixed for filing objections to the plan, notice of the hearing considering confirmation of the plan, or any other relevant notice.

We review the bankruptcy court's findings of fact for clear error, Fed. R. Bankr. P. 8013, and its conclusions of law *de novo*. *In re Professional Inv. Properties*, 955 F.2d 623, 626 (9th Cir. 1992). We independently review the bankruptcy court's determinations and do not give deference to the district court. *In re Weisman*, 5 F.3d 417, 419 (9th Cir. 1993).

[1] We agree with the district court that the bankruptcy court erred in treating Mr. Levin's claim as one not known to Maya, and that Levin was entitled to formal notice of the proceedings. Though Levin told Mr. Ruiz he was not going to sue Maya, Mr. Levin's lawyer sent Maya a formal written demand which gave Maya reason to think the contrary. The record does not show which came first. Maya had nothing of formality comparable to the lawyer's letter, such as a written release, discharging Mr. Levin's potential claim. Mr. Levin's state of mind and intention did not obviate Maya's knowledge that it had placed contaminated soil on Levin's land and that, whether he planned to sue Maya or not, he had a potential claim. Maya, as the district judge noted, understood the seriousness of the potential claim and caused its attorneys to provide an evaluation of it.

[2] Maya was required to file a list of all creditors and a schedule of liabilities and assets. 11 U.S.C. § 521(1). The debtor lists the creditors, so it is the debtor's knowledge of a creditor, not the creditor's knowledge of his claim, which controls whether the debtor has a duty to list that

creditor. *See In re Hi-Lo Powered Scaffolding, Inc.*, 70 B.R. 606, 610 (Bankr. S.D. Ohio 1987) (rejecting idea that "a claim arises only at such time as the entity asserting the claim learns of its existence."). The bankruptcy court must give formal notice of the first meeting of creditors to all creditors. Fed. R. Bankr. P. 3002. The notice must also advise of the method and deadline for filing a proof of claim. Fed. R. Bankr. P. 2002. Maya neither listed Levin as a creditor nor gave him any of the requisite formal notices. This is significant because if a contingent creditor such as Mr. Levin fails to file a proof of claim within the prescribed time limit, his claims are discharged by confirmation of a reorganization plan. 11 U.S.C. § 1141(d)(1)(A).

[3] Generally, if a known contingent creditor is not given formal notice, he is not bound by an order discharging the bankruptcy's obligations. The fact that a creditor has actual knowledge that a Chapter 11 bankruptcy proceeding is going forward involving a debtor does not obviate the need for notice. As the Supreme Court explained in *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953):

> Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on the creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred. . . .

> The statutory command for notice embodies a basic principle of justice – that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights.

Id. at 296-97.

[4] A debtor must list a creditor whose identity and claim he knows. 11 U.S.C. § 521. The burden is on the debtor to cause formal notice to be given; the creditor who is not given notice, even if he has actual knowledge of reorganization proceedings, does not have a duty to investigate and inject himself into the proceedings. *Id.; In re Spring Valley Farms, Inc.*, 863 F.2d 832, 835 (11th Cir. 1989); *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir. 1974); *In re Harbor Tank Storage Co., Inc.*, 385 F.2d 111, 114 (3d Cir. 1967). Maya seeks to free itself of an obligation by means of a federal court judgment. As a matter of due process, the person whose entitlement to money from the debtor will be destroyed by the judgment is entitled to notice. *Collier on Bankruptcy* § 1141.01(b), at 1141-17 & n.40 (Lawrence P. King ed.) (1993).

[5] Our chapter 7 and 13 cases, *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428 (9th Cir. 1990), and *In the Matter of Gregory*, 705 F.2d 1118 (9th Cir. 1983), are distinguishable because the lack of formal notice of a proof of claims deadline is not as significant in those chapters. In contrast to the rule governing proofs of claims in a Chapter 11 suit, which instructs the court to fix a proof of claims deadline and permits the court to extend that deadline "for cause shown," Fed. R. Bankr. P. 3003(c)(3), the rule governing Chapter 7 and 13 proceedings provides that proofs of claim shall be filed within 90 days of the first creditors meeting and specifies limited exceptions. Fed.

R. Bankr. P. Rule 3002. Thus, once the creditors in *Coastal* and *Gregory* had received notice of the creditors meeting, they had effective notice that proofs of claim were due within 90 days, unless very limited exceptions applied. *See In Re Unioil*, 948 F.2d 678, 683 (10th Cir. 1991) ("the rule that governs notice and dischargeability in Chapter 7 does not apply in Chapter 11" so formal notice of bar date is necessary in a Chapter 11 proceeding even if not necessary in Chapter 7). In contrast to creditors in a Chapter 7 or 13 case, even if Levin had received notice of a creditors meeting or any other formal notice, *which he did not*, he still would not have known when the deadline for filing proofs of claims was, and therefore, cannot be said to have been given any notice. In *Coastal Alaska Lines*, even though the creditor did not receive notice of the claims bar date, he received a copy of the first notice of creditors meeting. Likewise, in *Gregory* the creditor received notice of the meeting of creditors.

Maya also cites *Wright v. Placid Oil Company*, 107 B.R. 104, 106-07 (N.D. Texas 1989) (injured worker not known because he did not file suit for injury until after the deadline had passed); *see also Chemetron Corp. v. Jones*, 1995 WL 744972, (3d Cir. Dec. 18, 1995) (residents and visitors of a neighborhood containing a toxic site were not known because their identities and the fact of injury was not reasonably ascertainable prior to their filing a tort suit). These cases are distinguishable because the debtor could not identify the potential creditors. Maya knew Mr. Levin had a potential claim against it. Knowing also that Mr. Levin did not intend to sue did not obviate the fact that he had a claim on which he could sue, if he learned more or changed his mind. Knowing that a

potential claimant does not presently intend to sue is not equivalent to discharge of a claim, as for example by a release.

[6] The district court concluded that Mr. Levin forfeited his claim by not acting more rapidly and aggressively to derail confirmation of the plan. The bankruptcy court ruled against Levin on a different ground, which we and the district court have rejected, that Mr. Levin's claim was not known. Accordingly, we vacate the judgment, and remand to the bankruptcy court so that it can determine whether, despite Maya's failure to list Mr. Levin as a creditor when it should have, the subsequent notice to Mr. Levin would cause his claim to be discharged by the order confirming the plan. *See In re Remington Rand Corp.*, 836 F.2d 825, 833 (3d Cir. 1988) (remand to determine whether four year delay between creditor's knowledge and action was too long). The bankruptcy court should decide in the first instance whether, when Mr. Levin eventually was served, he had notice that the proceedings were far advanced and, by waiting too long to take action, "ignore[d] the proceedings to which the notice refers at [his] peril." *Gregory*, 705 F.2d at 1123. *See In re Hunt*, 146 B.R. 178 (Bankr. N. D. Tex. 1992) (two and one half year delay too long); *In re Pagan*, 59 B.R. 394 (Bankr. D.P.R. 1986) (four year delay too long).

Accordingly, the district court judgment is REVERSED, and the bankruptcy court judgment is VACATED and REMANDED so that the bankruptcy court can make the determination set out above.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: MAYA CONSTRUCTION COMPANY, ID# 86-0352941, Debtor.	)	No. 93-17195 D.C. No. CV-93-00233-JMR ORDER
ALAN L. LEVIN, Appellant, v. MAYA CONSTRUCTION, Appellee.	)	(Filed Apr. 4, 1996)

Before: GOODWIN, POOLE and KLEINFELD, Circuit Judges.

The petition for rehearing filed March 19, 1996, is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re Maya Construction Company, Debtor.	)	No. CIV 93-233 TUC JMR
ALAN L. LEVIN, Appellant, vs. MAYA CONSTRUCTION COMPANY, Appellee.	)	ORDER

INTRODUCTION

Creditor Alan L. Levin appeals from the bankruptcy court's determination that he is bound by the terms of Debtor Maya Construction Company's plan of reorganization. For the reasons set forth below, the bankruptcy court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Debtor/Appellee Maya Construction Company ("Maya") and Appellant Alan L. Levin ("Levin") were parties to a contract whereby Levin agreed to permit Maya to discard onto Levin's property excess soil excavated from a state-sponsored construction project.[1] The

[1] Levin's property consists of a 27 acre parcel located at the northeast corner of 16th Street and 3rd Avenue in Tucson, Arizona.

placement of the soil occurred during 1989 and 1990. In 1990, Maya and Levin learned that the soil contained diesel fuel contaminants and that removal costs were enormous.

Maya filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* on February 22, 1991. Over the next several months, Maya followed normal bankruptcy procedures. In March of 1991, Maya filed its schedules and statement of affairs and compiled a mailing list of creditors and interested parties. The debtor's schedules did not list Levin as a creditor, nor was he included on the master mailing list. As a consequence, Levin did not receive formal notice of Maya's bankruptcy petition, the first meeting of creditors, or the claims bar date.

Near the end of the bankruptcy proceeding after a hearing on the confirmation of its plan, Maya filed an amendment to its schedules and mailing list adding Levin as a disputed contingent claimant.[2] Maya thereafter filed and served an objection to Levin's contingent claim. Levin filed a response to Maya's objection and the bankruptcy court scheduled the matter for hearing.

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[2] As discussed by the bankruptcy court for the Southern District of New York, "Code § 1111(a) provides that a proof of claim is deemed filed in a Chapter 11 case if the claim is scheduled pursuant to Code § 521(1) and is not listed as being either disputed, contingent or unliquidated. On the other hand, any creditor whose claim is not scheduled, or whose claim is scheduled as disputed, contingent, or unliquidated, must file a proof of claim within the prescribed time. B.R. 3003(c)(2)." *In re Nutri*Bevco, Inc.*, 117 B.R. 771, 778 (Bankr. S.D.N.Y. 1990).

At the hearing, the bankruptcy judge designated the matter as an adversary proceeding and directed that it be set for trial. In the interim, the bankruptcy court entered an order confirming Maya's plan of reorganization. Levin received notice of the court's order, but did not appeal. Ten months later, Levin filed an objection to the discharge of the claim. In its March 21, 1993 order, the bankruptcy court determined that Levin was bound by the plan and that his claim was discharged.

The bankruptcy court entered the following factual findings:

> The court finds that the debtor was hired by Levin to place soil on debtor's property; that such soil was contaminated; that Levin discovered the contamination pre-petition; that the debtor filed its petition under Chapter 11 on February 2[2], 1991; that Levin had actual notice of the debtor's bankruptcy; that Levin did not file a claim in this matter prior to the bar date; that Levin did not ask the court to extend the bar date; and that the debtor did not file a claim in Levin's behalf.
>
> The court also finds that Levin was not placed on the master mailing list by the debtor, nor did Levin request to be added; that the debtor's disclosure statement was approved on October 24, 1991; that the debtor's plan was initially confirmed on February 24, 1992; that Levin did not receive notice of the hearings concerning the debtor's disclosure statement and plan; that Levin was added to the master mailing list and that this claim was added to the debtor's schedules on December 20, 1991; that the notice of the order of confirmation was

> mailed to Levin and that Levin did not file an objection to or appeal the confirmation order.
>
> The court further finds that Levin did not know of its claim against the debtor until after the debtor's plan was confirmed; and that during the pendency of the case, Levin indicated that he would not file a claim in this bankruptcy.

With these factual underpinnings established, the bankruptcy court concluded as a matter of law that Maya "could not have known that Levin would file a claim in the matter . . . and that Levin's claim was discharged upon confirmation of the debtor's plan."

STANDARD OF REVIEW

Rule 8013 of the Rules of Bankruptcy Procedure specifies that the bankruptcy court's findings of fact shall be accepted on appellate review unless clearly erroneous. Bankr. Rule 8013. Conclusions of law are reviewed de novo. *In re Professional Inv. Properties of America*, 955 F.2d 623, 626 (9th Cir.), *cert. denied*, 113 S.Ct. 638 (1992).

DISCUSSION

I.

On appeal, Levin complains that the lack of formal notice deprived him of his due process rights and therefore he is not bound by Maya's plan of reorganization. Due process demands that a creditor in a Chapter 11 case receive reasonable notice of a claims bar date before it is effective against the creditor. *City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 297

(1953); *In re Rose Exterminator Co., Inc.*, 135 B.R. 637 (Bankr. E.D. Mo. 1992). Unquestionably, a "fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake." *Reliable Elec. Co., Inc. v. Olson Const. Co.*, 726 F.2d 620, 623 (10th Cir. 1984). Generalized knowledge is insufficient to meet constitutional standards. *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 834 (11th Cir. 1989). However, "[t]he requirements of adequate notice differ with respect to known creditors and unknown creditors." *Wright v. Placid Oil Co.*, 107 B.R. 104, 108 (N.D. Tex. 1989) (quoting *Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1386 (10th Cir. 1987)). Constructive notice to unknown creditors satisfies due process. *Id.*

The bankruptcy court found credible Maya's allegation that Levin made statements to Maya's president, Roberto Ruiz, that he would not assert a claim against Maya for the contamination. The court also relied upon evidence that Levin made public his belief that any cause of action he may have for damage to his property must be asserted exclusively against the state. The court apparently discounted the fact that Maya retained legal counsel to investigate his potential liability to Levin. Accordingly, the judge ruled that Levin was an unknown creditor and discharged his claim on that basis.

This Court cannot adopt the bankruptcy court's findings in view of the obvious concerns Maya displayed regarding the contamination. Although Maya's attorney reported that Levin had no *good* claim against the company for the contamination, Maya was clearly aware that Levin had at least the potential for a claim. On these facts,

the bankruptcy court was clearly erroneous in concluding that Levin was an unknown creditor.[3]

II.

Despite the lack of formal or constructive notice, the Court finds that Levin's claims were properly discharged in bankruptcy. The key inquiry is whether the claimant is permitted to dispute the plan which the debtor hopes to enforce. *Reliable Elec. Co., Inc.*, 726 F.2d at 623 (creditor denied opportunity to comment on plan and therefore was not bound). Unlike the beleaguered creditor in *Reliable Elec. Co., Inc.*, however, Levin received notice of the confirmation of the debtor's plan and could have lodged an appeal at that time but did not. Nor did Levin seek to file an untimely claim despite the numerous procedural mechanisms open to him in that regard. Bankr. Rule 3003(c)(3) (a bankruptcy court may, in its discretion, extend the bar date to allow for late claims for cause shown); Bankr. Rule 9006(b) (the court "may at any time in its discretion . . . on motion made after expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."). Rather than availing himself of the appropriate remedies

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[3] Even assuming Levin could be considered an unknown creditor, he would have been entitled to constructive notice. *Placid Oil Company*, 107 B.R. at 106. Notice by publication is adequate. *Id.* Although it is undisputed that Levin had actual notice of the bankruptcy proceeding, there is no indication in the record that Maya furnished notice by publication to its unknown creditors.

in the first instance, Levin chose instead to pin his hopes on a successful appeal. Levin chose poorly.

CONCLUSION

The bankruptcy court's order ruling that Appellant Alan L. Levin is bound by Appellee/Debtor Maya Construction Company's plan of reorganization is **AFFIRMED** and this appeal is **DISMISSED.** Each side is to bear its own fees on appeal.

DATED: October 21, 1993

/s/ John M. Roll
JOHN M. ROLL
United States District Court

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re MAYA CONSTRUCTION COMPANY, an Arizona Corporation, Debtor.	Chapter 11 No. 91-00611-TUC-LO FINDINGS OF FACT and CONCLUSIONS OF LAW (Filed Mar 21, 1993)

CASE HISTORY

The debtor's relationship with creditor Alan Levin began sometime in 1989, when Levin hired the debtor to place about 60,000 yards of dirt on his property. The soil that was taken by the debtor from a site believed to be owned, operated, or managed by the State of Arizona or its agencies, was later determined to be contaminated. Such determination was made on several occasions just prior to the debtor's bankruptcy petition. The cost of removing the contaminants, in compliance with the regulations set forth by the Arizona Department of Environmental Quality, is substantial.

The above captioned debtor filed its petition under Chapter 11 of the United States Bankruptcy Code on February 2, 1991. The debtor's schedules did not list Alan Levin as a creditor, nor was Levin listed on the debtor's master mailing list at that time. The debtor's disclosure statement was approved on October 24, 1991, and its plan was initially confirmed on December 3, 1991. Levin did not receive notice of these proceedings. It wasn't until

December 20, 1991 that Levin filed a contingent claim in this matter and was added to the master mailing list.

Levin claims that he is not bound by the debtor's plan because he was denied due process as he was not given notice of the debtor's disclosure statement and plan confirmation hearings. The debtor claims that Levin is bound by the plan because he had a generalized knowledge of the bankruptcy and could have filed a claim at any time prior to the confirmation of the debtor's plan. The debtor further alleges that Levin during several post-petition discussions, indicated that he would not file a claim in this matter, and that he would pursue other parties in state court to recoup his losses. Levin refutes these contentions. The court determines that Levin is bound by the debtor's plan, and now makes the following findings of fact and conclusions of law in support of this decision.

FINDINGS OF FACT.

The court finds that the debtor was hired by Levin to place soil on debtor's property; that such soil was contaminated; that Levin discovered the contamination pre-petition; that the debtor filed its petition under Chapter 11 on February 2, 1991; that Levin had actual notice of the debtor's bankruptcy; that Levin did not file a claim in this matter prior to the bar date; that Levin did not ask the court to extend the bar date; and that the debtor did not file a claim in Levin's behalf.

The court also finds that Levin was not placed on the master mailing list by debtor, nor did Levin request to be added; that the debtor's disclosure statement was

approved on October 24, 1991; that the debtor's plan was initially confirmed on February 24, 1992; that Levin did not receive notice of the hearings concerning the debtor's disclosure statement and plan; that Levin was added to the master mailing list and that his claim was added to the debtor's schedules on December 20, 1991; that the notice of the order of confirmation was mailed to Levin and that Levin did not file an objection to or appeal the confirmation order.

The court further finds that Levin did not know of its claim against the debtor until after the debtor's plan was confirmed; and that during the pendency of the case, Levin indicated that he would not file a claim in this bankruptcy.

CONCLUSIONS OF LAW.

It is well established that a creditor is entitled to actual and formal notice regarding the approval of a debtor's disclosure statement and plan of reorganization before his claim can be discharged pursuant to Bankruptcy Code § 1141. See, *In re Turning Point Lounge, Ltd.* 111 B.R. 44 (W.D. N.Y. 1990); (creditor not bound by confirmed plan pursuant to 11 USCS § 1141 where creditor was not listed as creditor and never received formal notice of reorganization proceeding or of confirmation hearing); and *In re Unioil,* 948 F.2d 678 (10th Cir. 1991), (creditor not bound by debtor's confirmed plan where it was not given actual notice of bar date or confirmation hearing).

The fact that a creditor has a generalized knowledge of the debtor's bankruptcy proceeding does not dispense

with the requirement that such creditor is entitled to formal notice of the hearings on debtor's disclosure statement and reorganization plan. See, *In re Spring Valley Farms Inc.*, 863 F.2d 832 (11th Cir. 1989), (11 USCS § 1141 does not discharge debt of creditor who failed to receive formal notice . . . . even if creditor had general existence of bankruptcy proceeding); and *In re Leading Edge Products*, 120 B.R. 616 (Bkrtcy Mass 1990), (generalized knowledge of bankruptcy proceeding did not provide creditor with means to protect its interests equal to that afforded creditors with formal notice, mere knowledge of filing does not shift burden to creditor to inquire as to hearing of disclosure statement and confirmation).

This court has determined that Levin never received notice of the claim bar date, nor did he receive notice of the disclosure statement or plan confirmation hearings. The debtor has cited Ninth Circuit case law holding that actual notice of the bankruptcy petition is sufficient to bar a creditor's claim upon a debtor's discharge. See, *In the Matter of Gregory*, 705 F.2d 1118 (9th Cir. 1983); *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428 (9th Cir. 1990); and *In re Price*, 871 F.2d 97 (9th Cir. 1989). These cases are inapplicable to the case at bar as they concern cases filed under Chapters 7 & 13 where knowledge of the bankruptcy petition is sufficient to allow any creditor to determine the bar date for filing their claims. See, *Bankruptcy Rule 3002*.

The debtor also argues that Levin had previously indicated that he had no intention to file a claim in this matter. The court accepts this allegation as fact considering that Levin did not file a claim in this matter until

December 20, 1991 despite having learned of the contamination as early as 1989. It is also true that Levin learned of the debtor's bankruptcy petition shortly after the petition was filed, and that he had numerous post-petition discussions with the debtor. To hold that Levin's due process rights were denied, it must be demonstrated that the debtor had reasonable notice of Levin's claim or potential claim. *In re Nutri Bevco*, 117 B.R. 771 (Bkrtcy S.D. N.Y. 1990). In this case, the debtor had knowledge that a claim would *not* be filed.

Additionally and perhaps more importantly, Levin in his affidavit filed February 14, 1993, in adversary A92-0032, at declaration # 18, indicates that he did not learn of his claim against the debtor until after the debtor's plan was confirmed. This supports the position that the debtor could not have known that Levin would file a claim in this matter, and also supports the position that Levin's claim was discharged upon confirmation of the debtor's plan. The Bankruptcy Code generally does not recognize claims arising pre-petition where a creditor learns of the *existence* of the claim post confirmation. *In re Hi-Lo Powered Scaffolding, Inc.*, 70 B.R. 606 (Bkrtcy S.D. Ohio 1987).

Levin's contention that if had he been noticed of the disclosure statement and plan confirmation hearings that he would have investigated and discovered his claim pre-confirmation is not persuasive. The cost of decontaminating his property should have provided the needed motivation to investigate his claim prior to confirmation. There is no reason to conclude that the mere receipt of such notices would have motivated Levin to investigate his claim. Levin has not filed a complaint alleging that he

was fraudulently induced by the debtor not to file a claim in this matter. The court also takes judicial notice that Levin was sent notice that the debtor's plan was confirmed on February 24, 1992, and that Levin did not timley [sic] appeal that order, and in fact waited approximately 10 months to file an objection to the discharge of claim.

As a result of the foregoing, for good cause appearing, IT IS ORDERED that Levin is bound by the terms of the debtor's plan.

DATED AT TUCSON, ARIZONA this Mar. 21, 1993

/s/ Lawrence Ollason
LAWRENCE OLLASON
UNITED STATES
BANKRUPTCY JUDGE

Copy of the foregoing mailed this 23 day of March, 1993, to:

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